UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

DOMSEY TRADING CORPORATION,
DOMSEY FIBER CORPORATION AND
DOMSEY INTERNATIONAL SALES
CORPORATION, A SINGLE EMPLOYER,
Respondents

ARTHUR SALM and FORTUNA EDERY,
individually and as Executrix of the
Estate of Albert Edery, deceased
Additional Respondents

and

INTERNATIONAL LADIES' GARMENT
WORKERS' UNION, AFL-CIO

LOCAL 99, INTERNATIONAL LADIES'
GARMENT WORKERS' UNION

Case Nos. 29-CA-14548
29-CA-14619
29-CA-14681
29-CA-14735
29-CA-14845
29-CA-14853
29-CA-14896
29-CA-14983
29-CA-15012
29-CA-15119
29-CA-15124
29-CA-15137
29-CA-15147
29-CA-15323
29-CA-15324
29-CA-15325
29-CA-15332
29-CA-15393
29-CA-15413
29-CA-15447
29-CA-15685

COUNSEL FOR THE ACTING GENERAL COUNSEL'S
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S
THIRD SUPPLEMENTAL DECISION

Administrative Law Judge Raymond P. Green issued a Third Supplemental Decision in the above-captioned matter on February 14, 2011, wherein he found that the corporate veil of Domsey Trading Corporation, ("DT") should not be pierced to hold its shareholder Arthur Salm personally and derivatively liable to satisfy DT's remedial obligations to the Board. Counsel for the Acting General Counsel takes exception to certain findings of fact and conclusions of law set forth in his decision.

Specifically, pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board - Series 8, as amended, Counsel for the Acting General Counsel takes exception to the administrative law judge's findings and conclusions as follows:

1. The administrative law judge ("ALJ") erred in failing to find that DT's corporate veil should be pierced, and Arthur Salm be found personally liable, under federal common law. Third Supplemental Decision ("Decision") at p.11, lines 2 – 4.

2. The ALJ erred in finding that General Counsel presented evidence as to only one element of *White Oak Coal*[1]. Decision at pg.9, lines 16-21, 29-30, p. 10, fn.12.

3. The ALJ erred in failing to find that the commingling element under *White Oak Coal* has been satisfied. Decision at p. 9, lines 16-21; 29-35.

4. The ALJ erred in crediting the testimony of Domsey's accountant Richard Mole. Decision at p. 9, lines 30 -35.

5. The ALJ erred in failing to find that the following factors under *White Oak Coal* have been satisfied: (1) operating as a separate

[1] *White Oak Coal Co.*, 318 NLRB 732 (1995), enfd., 81 F.3d 150 (4th Cir. 1996).

(6) use of corporate form as a mere shell; (8) diversion of corporate funds or assets to noncorporate purposes and (9) transfer or disposal of corporate assets without fair consideration. Decision at p.9, lines 29-30, 43-45; p. 10, lines 10-12; p. 11, lines 2-4.

6. The ALJ erred in finding that the trust fund doctrine of piercing the corporate veil was:

   a. an alternate theory. Decision at p.10, lines 14 – 31;

   b. raised post hearing. Decision at p.10, lines 26 – 31.

7. The ALJ erred in finding that the theory of pre-emption precludes consideration of New York Law regarding shareholder derivative liability when a corporation has dissolved. Decision at p.10, lines 33 – 43.

8. The administrative law judge erred in failing to find that Arthur Salm was an alter ego of DT as alleged in paragraph 13 (b) of the Notice of Hearing.

9. The ALJ erred in failing to find that the corporate veil could be pierced, and Arthur Salm found personally liable, under alternative theories, including state and federal law.

10. The ALJ erred in failing to find that, based on Domsey's failure to file an Answer, all allegations detailed in the Notice of Hearing with respect to Domsey are admitted.

11. The ALJ erred in rejecting General Cousel Exhibit 14.

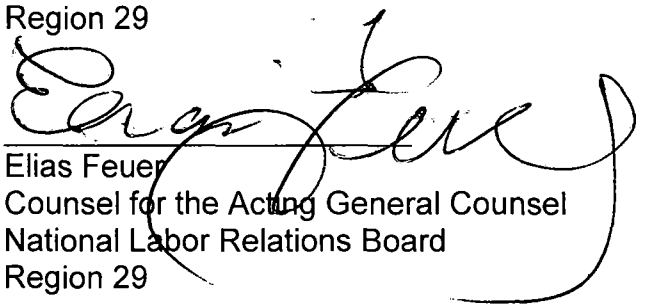
12. The ALJ erred in failing to admit post-hearing Exhibit GC 16.

13. The ALJ erred in finding that General Counsel "produced no evidence to contradict the testimony of the Respondent's CPA that the corporate entities were adequately funded ...[and] maintained adequate ... corporate books and records." Decision at p. 9, lines 30-34.

The specific grounds and authorities for these exceptions are set forth in the attached brief.

Respectfully submitted,

Aggie Kapelman
Counsel for the Acting General Counsel
National Labor Relations Board
Region 29



Elias Feuer
Counsel for the Acting General Counsel
National Labor Relations Board
Region 29

Dated this 4th day of April, 2011

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COUNSEL FOR THE ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S THIRD SUPPLEMENTAL DECISION

STATEMENT OF THE CASE [1] [2]

The primary question in this case is whether the shareholders of a closely held corporation are entitled to receive the full proceeds from the sale of the corporation's sole asset, if that distribution will deprive the Board, a corporate creditor, of its ability to satisfy a final liquidated judgment against the corporation? Or put slightly differently, does Board law permit a corporation to defeat its remedial monetary obligation by cashing out, through a liquidating distribution to its shareholders, leaving the Board recourse only against an empty corporate shell?

ALJ Green recognized the inequity that would result from failing to impose derivative liability on shareholder Arthur Salm. He held that "[p]aying these workers is the morally correct thing to do. The issue here is whether that moral obligation is coextensive with a legal obligation." (ALJD, p. 6, ll. 5 and 6). The ALJ erroneously concluded that the Board's derivative liability body of law did not support piercing the corporate veil of Domsey Trading Corp. ("DT"), and thus the Board was not entitled to recover the ill-gotten gains received by DT president

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[1] The abbreviation "GCx." refers to specific General Counsel's exhibits. The abbreviation "Tr." refers to a specific page in the transcript. "Ex." refers to a specific General Counsel exception. "ALJD" refers to the administrative law judge decision.

[2] The Domsey corporations failed to file an Answer in this matter. Yet, in his Decision, the administrative law judge failed to make a finding on this issue. (Ex.10)

Pursuant to the Board's Rules and Regulations, § 102.56(c):

> If the respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without further notice to the respondent, find the specification to be true and enter such order as may be appropriate.

Accordingly, all of the allegations detailed in the Notice of Hearing should be found admitted.

and shareholder Arthur Salm at the expense of its creditor, the National Labor Relations Board. In essence, the ALJ concluded that as DT wound down its business, it was entitled to pay Salm a liquidating distribution of $3.2 million, despite the adverse impact of that action on its creditor, the Board. In the ALJ's view, Salm could not be lawfully limited to receiving a $1 million distribution because his claim to the remaining $2.2 million was superior to the Board's claim on behalf of the 181 adjudicated discriminatees.[3] In his deference to the corporate form, the ALJ erroneously concluded that Salm was shielded from disgorging and paying over to the Board any of that excess $2.2 million that DT transferred to him.

Common sense and decency rebels against the notion that a corporate respondent can avoid its legal obligations to the Board (and numerous discriminatees) by selling its business, or its only tangible asset, and distributing the proceeds of that sale to its shareholders. Shareholders are not entitled to obtain and retain an excessive liquidating capital distribution at the expense of legitimate creditor claims against the corporation. In such a case, it is axiomatic that the corporate veil must be pierced and the shareholder who would otherwise be unjustly enriched must surrender his ill-gotten gains.[4]

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[3] See GCx. 16 which was submitted with the General Counsel's post-hearing brief. (Ex. 12)

[4] On January 21, 2011, an Order Dissolving Writ of Garnishment, Vacating Protective Restraining Order and Requiring the Sequestration of Funds was entered. *N.L.R.B. v. Domsey Trading Corp. et al*, Case No. MC 10-543 (KAM) (EDNY), Document 54. Pursuant to the Order $1.2 million of Arthur Salm's funds have been sequestered. If a final, non appealable order is issued by a United States Court of Appeals "finding that Salm is not personally liable for payment of any amount in satisfaction of any liability found owing in Board Case No 29-CA-14548," the sequestered funds must be returned to him.

The essential facts of this case are:

- DT is one of three Domsey corporations that are jointly and severally liable for satisfying a make whole remedy in favor of 181 discriminatees.
- An ALJ issued a Supplemental Decision liquidating DT's liability.
- When DT sold its only asset, its liability to the Board, inclusive of interest, exceeded $2 million.[5]
- DT distributed almost $8 million in sales proceeds to its president, Arthur Salm and its vice-president Albert Edery, 48% and 50% shareholders, respectively.[6]
- This distribution rendered DT insolvent.
- Arthur Salm received more than $3.2 million in sales proceeds from DT. (ALJD, p. 4, l. 32)
- Salm's entire distribution was deposited into his personal account. (ALJD, p. 5, ll. 15-16)
- Salm did not use his distribution to satisfy any DT obligations. (GCx. 1(m))
- DT has been dissolved by proclamation. (GCx. 1(m))

[5] See rejected GCx. 14. (Ex. 11)

[6] Albert Edery is deceased. His widow, Fortuna Edery was named as an additional Respondent in the Compliance Specification and Notice of Hearing. After the close of the hearing, the ALJ remanded the allegations pertaining to Fortuna Edery to the Regional Director for Region 29 so that he could process a negotiated settlement agreement, part of which is contingent on the Region's ability to successfully prosecute its case against Salm. Similarly, before the hearing opened, the Regional Director approved a settlement agreement with Salm's sons David and Peter Salm which is also partially contingent on a finding of derivative liability against Arthur Salm. (ALJD fns. 2 and 3)

ARGUMENT

I. The Corporate Veil Can Be Pierced to Reach a Shareholder Who Receives a Transfer of Funds That Renders a Corporation Unable to Pay Its Debts [Ex. 1, 2, 3, 5, 6, 7, 8, 9]

"Courts normally treat a corporation as an entity distinct from its shareholders, but they will disregard the corporate form if it is abused." Piercing the Corporate Veil: The Alter Ego Doctrine Under Federal Common Law, 95 Harv. L. Rev. 853 (1982). As a general rule, shareholders are insulated from the liabilities of a corporation. However, part of the bargain shareholder investors accept when they create a corporation, especially closely held corporations like DT, and receive protection from personal liability, is that before shareholders can cash out their investments, creditors must be made whole. *D.L. Baker Inc. t/a Baker Electric*, 351 NLRB 515, 522-524 (2007). Bankruptcy law also embraces this principal. Payments to insiders, including shareholders, can be recaptured when those payments have impaired the ability of the debtor to make full payment to its creditors. See 11 U.S.C. Sections 547 and 548.

Federal Common Law

Bankruptcy provisions that permit piercing of the corporate veil are consistent with federal common law principals. A liquidating distribution made to shareholders is subject to disgorgement if other creditor claims, even contingent ones, have not been satisfied. Ninety years ago, Justice Brandeis noted that federal law holds that: "[t]he corporation cannot disable itself from responding by distributing its property among its stockholders and leaving remediless those having valid claims. In such case the claims after being reduced to judgments

may be satisfied out of the assets in the hands of the stockholders." *Pierce et al. v. United States*, 255 U.S. 398, 402, 41 S.Ct. 366 (1921). This principal is grounded in English common law. *Id.* citing *King v. Woolf*, 2 B. & Ald. 609, 611. "[W]hen a corporation divests itself of all its assets by distributing them among the stockholders, those having unsatisfied claims against it may follow the assets, although the claims were contested and unliquidated at the time the assets were distributed." *Pierce* at 403. Further, both commercial creditors and the United States have the right to "follow distributed assets" in order to secure their remedy. *Id.* In this case, like in *Pierce*, the shareholder/officer distributee had knowledge of the government's claim. Salm admitted knowledge of the 1999 ALJ Supplemental Decision when he effectuated the transfer of assets. See GCx. 1(m).

The term piercing the corporate veil was coined in 1927, a few years after *Pierce*, by Professor Maurice Wormser who stated:

> [I]n the present condition of the authorities, a corporation will be looked upon by the courts as a legal personality, for ordinary purposes in everyday business transactions as a general principle and until adequate reason to the contrary appears; but...the fiction will be disregarded and the law will look to see the men and facts behind the fiction whenever it is employed to 'defraud creditors, to evade an existing obligation, to circumvent a statute, to achieve or perpetuate monopoly, or to protect knavery and crime.' [7]

The concept of piercing the corporate veil to reach a shareholder is not unique to federal common law. Growing out of English common law, it is not

[7] Presser, Stephen B., *Piercing the Corporate Veil*, ¶1:5, p.2. quoting M. Wormser, *Disregard of the Corporate Fiction and Allied Corporation Problems* 38 (New York: Baker, Voorhis and Co. 1927), quoting 12 Colum. L. Rev. 517.

surprising that every State, including New York State, embraces this principle, sometimes described as the trust fund doctrine. *Cowden Manufacturing Company v. United States of America*, 340 F. Supp. 1204, 1206 (1972). "[A]fter dissolution, the shareholders to whom are distributed the remaining assets of the corporation are said to 'hold the assets which they received in trust for the benefit of creditors....As a result, the shareholders remain jointly and severally liable to existing creditors of the corporation.'" *Rodgers v. Logan*, 121 A.D.2d 250, 253, 503 N.Y.S.2d 36 (1st Dept. 1986) quoting *Plastic Contact Lens Co. v. Frontier of the Northeast, Inc.*, 324 F.Supp.213, 220 (W.D.N.Y. 1969) *aff'd* 441 F.2d 67 (2d Cir. 1971) *cert. denied* 404 U.S. 881, 92 S.Ct. 196, 30 L.Ed.2d 162. *See also Long Island Light Co. v. Chestnut Sta., Inc.,* 2010 N.Y. Misc. Lexis 3476, 2010 NY Slip Op 31973U (N.Y. Sup. Ct., July 15, 2010),[8] *Wells v. Ronning*, 269 A.D.2d 690, 692, 702 N.Y.S.2d 718 (3d Dept. 2000).[9]

DT has been dissolved and Arthur Salm is still in possession of its corporate assets. He holds these assets in trust for the benefit of the Board, DT's creditor. This common law principle of shareholder liability that requires piercing of the corporate veil is consistent with, and in accord with, *White Oak Coal Co.*, 318 NLRB 732 (1995), enfd., 81 F.3d 150 (4th Cir. 1996). Embedded in the rationale underlying the need to automatically pierce the corporate veil to repatriate assets of a dissolved corporation is a *White Oak Coal* analysis.

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[8] See New York Business Corporations Law § 1006(b) which states: "The dissolution of a corporation shall not affect any remedy available to or against such corporation, its directors, officers or shareholders for any right or claim existing or any liability incurred before such dissolution, except as provided in sections 1007 (Notice to creditors; filing or barring claims).

[9] The ALJ erred in concluding that he could not consider New York law because of the pre-emption doctrine. (Ex. 7) Pre-emption applies when there is a conflict between state and federal law. With respect to the trust fund doctrine, there is no such conflict.

Consistent with *White Oak Coal*, the conduct engineered by DT's president and shareholder in this case shows a per se disregard of corporate form and requires piercing the corporate veil. This is neither an alternative theory nor is it inconsistent with the pleadings in the Notice of Hearing ("N.O.H."). The facts to support a per se analysis of the conduct in this case are uncontested and are set forth in paragraphs 4, 5, 10, 11 and 12 of the N.O.H. These operative facts which were fully litigated support the "piercing" legal theory set forth in paragraph 13 of the N.O.H. This legal argument is not a new legal theory that was introduced post-hearing. Although counsel for the Acting General Counsel twice amended her pleadings, her statements that identified *White Oak Coal* as the leading case in support of the General Counsel's legal theory could not reasonably be viewed as an amendment to the Notice of Hearing that narrowed the permissible legal arguments that could be presented in support of a derivative liability finding.

II. It is Appropriate to Pierce the Corporate Veil of Domsey Trading Corp. and Find Arthur Salm Derivatively Liable to Fulfill its Remedial Obligations to the Board Based Upon the *White Oak Coal Co.* Test [Ex. 1 – 9, 13]

White Oak Coal is recognized as the seminal case in piercing the corporate veil under the National Labor Relations Act ("Act"). It is well-settled that the corporate veil may be pierced and individuals held personally liable for violations of the Act committed by corporations they control if: "(1) there is such unity of interest, and lack of respect given to the separate identity of the corporation by its shareholders, that the personalities and assets of the corporation and the individuals are indistinct, *and* (2) adherence to the corporate

form would sanction a fraud, promote injustice, or lead to an evasion of legal obligations." *Id.* at 735. *See also A.J. Mechanical, Inc.*, 352 NLRB 874 (2008), enfd. 186 LRRM 2224 (11th Cir. 2009); *D.L. Baker 351 NLRB* at 521. That both prongs for piercing the corporate veil have been satisfied in this case cannot be seriously contested.

In assessing the first prong, in determining whether the shareholders and the corporation have failed to maintain their separate identities, "the Board will consider generally (a) the degree to which the corporate legal formalities have been maintained, and (b) the degree to which individual and corporate funds, other assets and affairs have been commingled. Among the specific factors we will consider are: (1) whether the corporation is operated as a separate entity; (2) the commingling of funds and other assets; (3) the failure to maintain adequate corporate records; (4) the nature of the corporation's ownership and control; (5) the availability and use of corporate assets, the absence of [same] or undercapitalization; (6) the use of the corporate form as a mere shell, instrumentality or conduit of an individual or another corporation; (7) disregard of corporate legal formalities and the failure to maintain arm's length relationship among related entities; (8) diversion of the corporate funds or assets to noncorporate purposes; and in addition, (9) transfer or disposal of corporate assets without fair consideration." *White Oak Coal* at 735.

The ALJ erroneously concluded that, at most, one *White Oak* factor was proven. Seven of the nine factors are present. The ALJ's application of *White Oak Coal* was flawed, in part, by his unstated assumption that if DT's

shareholders failed to respect legal formalities in the disputed transaction, their general or historical respect for those formalities shielded its principals from derivative liability.[10] His analysis should have focused on the disputed transaction.

Transactional analysis is commonly applied in piercing cases. *MCI Telecommunications Corp. v. O'Brien Marketing Inc.*, 913 F. Supp. 1536, 1540-1541 (S.D. FL. 1995); *Network Enterprises, inc. v. APBA Offshore Productions, Inc.* 427 F. Supp. 2d 463, 487-488 (S.D.N.Y. 2006); See also, *Greater St. Louis Construction Laborers Welfare Fund v. Sunrise Construction, Inc.*, 2009 WL 73664 at *3 (E.D. Mo. 2009). The transactional framework for evaluating the liability of Arthur Salm and Albert Edery requires an analysis of the sale of 431 Kent Avenue, Brooklyn, New York and the manner in which the sales proceeds were disposed. Salm and Edery participated in the sale in their capacities as DT's chief corporate officers and as 98% owners of DT. Both of them also participated in the sale through their joint venture Edery-Salm Associates. (GCx.

[10] The ALJ erroneously credited and relied on the conclusory testimony of Mole, DT's accountant, concerning corporate formalities that preceded DT's property sale. The accountant based his testimony on documents that were in his control, but not produced. Had Mole produced documents, some may have supported his assertions about the adequacy of corporate records, commingling and capitalization. However, with regard to the document in evidence, submitted by General Counsel, it undermines these unsupported assertions. This point is best illustrated by DT's 2002 Corporate Tax Return. (GCx. 4, pp. 4, 12). The Balance Sheet (p. 4) directly undermines the accountant's testimony about record keeping and capitalization. Remarkably, the balance sheet, with its statements in support, omits DT's $2+ million liability to the Board. It also shows that, as of 1-1-02, DT had negative working capital even without its debt to the Board. [Its current liabilities exceeded its current assets.] Thus, contrary to the finding of the ALJ, the accountant's testimony does not support the conclusion that DT kept proper corporate records or was adequately capitalized. (Ex. 13) Under these circumstances, the adverse inference requested in counsel for the Acting General Counsel's brief to the ALJ should have been applied and the testimony should have been discredited or, at most, given little, if any, weight. (Ex. 4) *Cooke's Crating*, 289 NLRB 1100 (1988); *Manning Construction, Inc.*, 2010 WL 2180792, slip op. at pp. 6-9 (April 7, 2010).

3) Within two weeks of the sale, DT disposed of its $9+ million in sales proceeds, almost $8 million of which went to Salm and Edery as DT's 98% owners. Salm signed the checks that he and Edery received. (ALJD, p. 5, ll 14-15 and 22-23) After disposing of its sales proceeds, DT had less than $1,000 on deposit, leaving DT no assets and no source of income with which to satisfy a debt of more than $2 million to the Board. (ALJD, p. 4, ll. 34-36)

Shareholders capitalize a corporation through their initial and subsequent investments so that parties doing business with the corporation have confidence that the corporation can be relied upon to pay its debts as they become due. Returns on capital, including dividend distributions, are paid with funds in excess of those needed to pay regular operating expenses and debts.[11] Liquidating dividends are paid with funds or excess capital that remains after all payables and creditor obligations have been satisfied. In other words, capital cannot be dissipated through a shareholder distribution if that distribution results in the rights of creditors being impaired. See *Pierce*.

DT's almost $8 million liquidating capital distribution to its controlling 98% shareholders did impair the rights of its creditor, the Board. That liquidating distribution exhausted DT's capital. It deprived the corporation of its only source for satisfying its debt to the Board. By definition, this premature liquidation of the corporation advanced no corporate interest. Instead, it advanced the purely personal interests of the principals of this closely held corporation who were

[11] After its Gulf of Mexico oil rig disaster, British Petroleum ("BP") faced an unliquidated liability exposure of tens of billions of dollars. BP suspended its dividend because it knew that there would be no surplus after it used its operating income to pay its day to day operating expenses and it set aside necessary funds to satisfy its significant remedial obligations.

unjustly enriched. Their ability to effectuate this premature dissolution of the corporation demonstrates how these two principals dominated DT and the transaction that is being attacked.

A review of the *White Oak Coal* factors shows that factors 1, 2, 3, 5, 6, 8 and 9 were present in DT's sale of its only tangible asset and its disposition of the sale proceeds. Turning to factor 1, the excessive capital distribution by DT to its 98% shareholders demonstrates that its shareholders so dominated the corporation that, in essence, by January 9, 2002, DT was not autonomous, but existed as an instrumentality of its shareholders with an allegiance solely to its shareholders [at the expense of its major creditor, the Board]. (Ex. 5)

Factor 2 addresses the commingling of funds. The unjustified, excessive transfer by DT of almost $8 million to its controlling shareholders and chief corporate officers is a classic example of commingling. The Board found that commingling occurred when, without fair consideration, a similar significant transfer of corporate assets was made to controlling shareholders. *A.J. Mechanical, Inc.* at 875-876. The ALJ properly concluded that of the nine factors, the commingling factor is "the most important". (ALJD, p. 9, l. 20). The Board has held that "(c)ommingling, treatment of corporate assets as one's own and undercapitalization often constitute the most serious forms of abuse of the corporate entity." *D.L. Baker,* 351 NLRB at 522. (Ex. 5).

With respect to Factor 3, DT's 2002 tax return (GCx. 4) demonstrates that DT failed to keep proper corporate records by omitting the Board's $2 million claim. Schedule L, the Balance Sheet, proves that fact. It is a permissible

inference that DT's certified financial statements, also prepared by, but not produced by the accountant, and required by the City of New York, included the same balance sheet. (Tr. 74-76). Thus, DT misrepresented its financial status to both New York City and the IRS by failing to report its $2+ million liability to the Board. Proper corporate records are accurate and transparent. The omission of the Board debt is material and shows that DT failed to keep adequate records. (Ex. 5)

In connection with factor 5, by carrying out this transaction, the principals exhausted DT's capital. When the transaction was completed, DT had a negative net worth, that is, its liabilities exceeded its assets by in excess of $2 million. Significant negative net worth is a sign that a corporation is undercapitalized. DT remained undercapitalized from at least January 2002, through its dissolution in October 2009. (Ex. 5) With regard to factor 6, when a corporation holds no assets, it is called a shell corporation. Through this transaction, and as a result of the liquidating distribution, DT, in fact, became a mere corporate shell awaiting its formal dissolution. After the January 9, 2002 sale, DT became an "instrumentality or conduit" for Salm to obtain an excessive share of the sales proceeds. There was no legitimate corporate purpose served by its premature and excessive capital distribution to Salm, and he presented no evidence to establish one.[12] (Ex. 5) As for factor 8, DT had no legitimate basis for making a liquidating capital distribution of all its corporate assets before it satisfied all of its creditor obligations. By not using a portion of those monies to

[12] The Balance Sheet of DT's 2002 corporate tax return shows that there were no outstanding shareholder loans as of January 1, 2002. (GCx 4)

pay its outstanding creditor, the Board, and instead, by using that money for Salm's personal purposes, corporate funds were diverted for noncorporate purposes. (Ex. 5) With respect to the final factor, factor 9, DT's only asset after its January 9, 2002, property sale was its cash balance. The final $2.2 million in cash that was transferred to Salm did not represent a return on his investment. Those excess funds were encumbered by a liability to the Board. It was not a legitimate source for a capital distribution. It was paid to Salm "without fair consideration." (Ex. 5)

The transactions engineered by DT's controlling shareholders to render DT insolvent demonstrate a sufficient unity of interest and lack of respect for the separate identity of the corporation and its shareholders to support the conclusion that the personalties and assets of DT and Salm were indistinct. Thus, the first prong of *White Oak Coal* has been satisfied.

As for the elements of the second *White Oak Coal* prong, they, too, are met in this case. Adherence to the corporate form would (1) sanction a fraud, (2) promote injustice and (3) lead to the evasion of legal obligations. The consequence of Salm keeping his excessive liquidating capital distribution which rendered DT insolvent and which he obtained because of his and Edery's domination of DT, as its controlling shareholders, would be to deprive the Board of a backpay remedy for 181 discriminatees who were the victims of egregious unfair labor practices. Thus, unless the Board is permitted to hold Arthur Salm personally responsible for this debt, by piercing DT's corporate veil and recapturing an appropriate and necessary portion of the excessive distribution

made to Salm,[13] an injustice will be promoted and the purposes and policies of the Act will be defeated.

In satisfaction of the second prong,"[t]he Board has not hesitated to pierce the corporate veil when individuals divert corporate funds for their personal benefit and, in the process, diminish the corporation's ability to satisfy its remedial obligation." *D.L. Baker,* 351 NLRB at 523-524, citing *Reliable Electric Co.*, 330 NLRB 714–715(2000); *West Dixie Enterprises*, 325 NLRB 194, 195 (1997), affd. 190 F.3d 1191 (11th Cir.1999) *Bufco Corp.*, 323 NLRB at 629; *Genesee Family Restaurant*, 322 NLRB 219, 229–230 (1996), enfd. 129 F.3d 1264 (6th Cir. 1997). By piercing DT's veil, the Board will ensure that all settlement funds already paid by Salm's sons and Fortuna Edery and the $1.2 million in currently sequestered Salm funds, will remain available to make whole the181 discriminatees in this case. Such an outcome is the definition of equity. Now is the moment for the Board to respond to this unprecedented attack on its ability to effectuate its remedies against a corporation.

Choosing the nuclear option—terminating one's business and cleaning out the corporate treasury for one's personal benefit without first providing for its creditors is unacceptable under federal common law and fails the *White Oak Coal* test. Such conduct can only be remedied by finding that Arthur Salm is

[13] Note, that a finding of Salm's personal liability here, does no harm to the body of law which generally insulates an individual from liability for corporate debts. Counsel for the Acting General Counsel seeks none of Salm's personal assets that were legitimately secured from his businesses, his investments, through inheritance or otherwise. General Counsel seeks no more than corporate assets of DT to the extent the corporation was first obliged to use those assets to pay off its debt to the Board. Those are assets to which Salm was not entitled but acquired through his domination and control of DT.

jointly and severally liable with the adjudicated Domsey entities to comply with the outstanding 1994 Court Judgment.

Accordingly, it is requested that an Order be issued (1) finding that Domsey Trading, Domsey Fiber and Domsey International, a single integrated enterprise, has admitted to all the allegations contained in the Notice of Hearing; (2) that Arthur Salm is the alter ego of DT; (3) that Arthur Salm is personally responsible to remedy the unfair labor practices of DT as found by the Board; and (4) Arthur Salm is jointly and severally liable with DT, Domsey Fiber Corp., and Domsey International Corp., to satisfy their remedial obligations that are set forth in *Domsey Trading Corp. et al*, 310 NLRB 777 (1993), enfd. 16 F. 3d 517 (2d. Cir.1994).

Respectfully submitted,

Aggie Kapelman
Counsel for the Acting General Counsel
National Labor Relations Board, Region 29
Two MetroTech Center, Suite 5100
Brooklyn, New York 11201
aggie.kapelman@nlrb.gov

Elias Feuer
Counsel for the Acting General Counsel
National Labor Relations Board, Region 29
Two MetroTech Center, Suite 5100
Brooklyn, New York 11201
elias.feuer@nlrb.gov

Dated at Brooklyn, New York
this 4th day of April, 2011.

UNITED STATES OF AMERICA
BEFPRE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

DOMSEY TRADING CORPORATION,
DOMSEY FIBER CORPORATION,
DOMSEY INTERNATIONAL SALES CORPORATION, A SINGLE EMPLOYER,
Respondents

ARTHUR SALM and FORTUNA EDERY, individually and as Executrix of the Estate of Albert Edery, deceased
Additional Respondents,

and

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO

LOCAL 99, INTERNATIONAL LADIES' GARMENT WORKERS' UNION

Case Nos. **29-CA-14548**
29-CA-14619
29-CA-14681
29-CA-14735
29-CA-14845
29-CA-14853
29-CA-14896
29-CA-14983
29-CA-15012
29-CA-15119
29-CA-15124
29-CA-15137
29-CA-15147
29-CA-15323
29-CA-15324
29-CA-15325
29-CA-15332
29-CA-15393
29-CA-15413
29-CA-15447
29-CA-15685

CERTIFICATE OF SERVICE

I hereby certify that I forwarded a true and correct copy of Counsel for the Acting General Counsel's Exceptions to the Administrative Law Judge's Third

Supplemental Decision and Brief in Support of Exceptions to the Administrative Law Judge's Third Supplemental Decision, this 4th day of April, 2011, by electronic mail to:

Office of the Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570-0001

and by electronic and regular mail to the following:

Errol F. Margolin, Esq.
Margolin & Pierce LLP
111 West 57th Street – Suite 410
New York, New York 10019
errolmargolin@aol.com

John P. Gibbons, Esq.
Spellman, Rice, Schure, Gibbons, McDonough & Polizzi LLP
229 Seventh Street, Suite 100
P.O. Box 7775
Garden City, NY 11530
jgibbons@spellmanlaw.com

Jeffrey A. Meyer, Esq.
Kaufman, Dolowich Voluck & Gonzo LLP
135 Crossways Park Drive – Suite 201
Woodbury, New York 11797
jmeyer@kdvglaw.com

Scott Markowitz, Esq.
Markowitz & Rabbach LLP
290 Broadhollow Road, Suite 301
Melville, New York 11747
scottm@mrlawfirm.com

Richard M. Greenspan, Esq.
220 Heatherdell Road
Ardsley, New York 10502
rick.rmglaw@verizon.net

Kristen L. Martin, Esq.
Davis, Cowell & Bowe LLP
595 Market Street, Suite 1400
San Francisco, CA 94105
klm@dcbsf.com

By: Aggie Kapelman
Aggie Kapelman